Supreme Court, U.S.
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No. 01-792

In The

Supreme Court of the United States

TINA SCHEVE and MARK W. STEVENS,

Petitioners,

vs.

THE MOODY FOUNDATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION AND REPLY TO REQUEST FOR SANCTIONS

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INTRODUCTION

Petitioners will confine this Reply to responding to charges that Petitioner has misstated the record, and stating per Supreme Court Rule 12 Respondent's own misrepresentation or material omissions of the record, and to a short reply to the request for additional sanctions.

Control of ANICO
(Responsive to Brief in Opposition, p. 5, Para. 1)

The financial documents referred to at *Brief in Opposition*, p. 6, are attached as App. Q, R and S. They detail a classic interlocking directorate scheme with the Moody Foundation and its Trustee Robert L. Moody, Sr. at the center.

App. Q, *Security Ownership of Certain Beneficial Owners*, shows that Moody Foundation owns outright 23.7% of ANICO. The Foundation also owns a 75% life estate interest (and remainder) in the Libbie Shearn Moody Trust, which in turn owns 37.58% of the common stock of ANICO. Thus the Moody Foundation holds 23.7% plus (.75 x 37.58%) = 51.887%.[1] See *Kidder v. H&B Marine*, 932 F.2d 1379 (5th Cir. 1991); 29 USCA Sec. 52, Special Rules.

Even that percentage understates the relationship between Respondent and ANICO. The trustee with "sole voting power" for the Libbie Shearn Moody Trust and the remaining (appx.) 37.58% in ANICO is Moody National

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[1] The descriptions criticized by Respondent, i.e., "control" and the 60% figure, were taken from Petitioners' Brief to the Court of Appeals, to which Respondent made no specific objection.

Bank. App. Q, n. 2. That Bank, in turn, is owned 97.8% by Moody Bank Holding Company, which is wholly owned by Moody Bancshares, Inc. – whose president is Robert L. Moody (Sr.), who also is Chairman of the Board of ANICO and the senior Trustee of Respondent, The Moody Foundation.

Reason for Timing of Termination
(Responsive to Brief in Opposition, p. 6, Para. 3)

Respondent claims, ***"Scheve, although not on vacation or sick leave, simply did not show up for work during that time period and her employment was terminated on the first day she returned to work."*** This claim is purely argument, was never previously made, is unsupported in the record and inconsistent with initial refusal of Trustee Francine Moody to articulate any reason.

The Summary Judgment evidence as to Respondent's Motivations consisted of the affidavit of Francine Moody, Debbie Beddoe, Patricia Ennis and Harold McDonald. *None* support the italicized phrase.

Nor could they. In her May 12, 1999 letter to Petitioners, App. T, Francine Moody did not claim – as counsel *now* asserts – that Ms. Scheve was absent without authorization for *two weeks* prior to her discharge, but simply wrote that Ms. Scheve's ***"job performance and attitude were not up to the standards of the Moody Foundation."***

Pleadings Not Amended
(Responsive to Brief in Opposition, p. 7, Para. 5)

Federal Rule of Civil Procedure 11 requires counsel to withdraw or "appropriately correct[ ]" an offending pleading. This was done promptly through the means of sworn answers to interrogatories on January 26, 2000. Pleadings were supplanted by summary judgment motions as the vehicle for assessing the merits of the case.

The Motion on which the trial court ruled was their **second**. The original Motion for Summary Judgment (Transcript Document No. 38) was filed one month after discovery made clear Petitioners' theory of the case.

Following the March, 2000 meeting before Judge Hughes (Conference Memo, Document 38, March 20, 2000), an Amended Summary Judgment Motion was filed addressing Scheve's position in the January 26 interrogatory answers, to which Respondent Scheve replied.

No Motion for New Trial
(Responsive to Brief in Opposition, p. 5)

That a motion for new trial was *not* filed simply illustrates how the extreme departure from the "accepted and usual course of judicial proceedings" compromised Petitioners' ability to defend themselves.

Petitioners do not gratuitously criticize any judge, but show the origins and impact of the pressure which was being applied. With the transcript of June 20 (App. F) in hand, it was unrealistic to believe that any significant relief or reversal would result. The hostility of the trial judge, obviously stemming from a *granted* recusal

motion, was manifest. Appellate opinions arising from the same court described a trial judge who had jailed an individual for following the court's own advice in an earlier hearing, and who possessed an exceptionally independent view of his own relationship to the appellate courts. See, e.g., *Natural Gas Pipeline Company of America v. Energy Gathering, Inc.*, 2 F.3d 1397 (5th Cir. 1993) appeal after remand 86 F.3d 464, 467-468 (1996).

A Motion For New trial would have been unproductive and possibly foolhardy. The only remaining alternative – unsatisfactory because it truncated Petitioners' appellate record – was an Fed. R. App. P. 8 Motion. That step was taken.

Reply to Respondent's Request for Award Of Costs and Attorneys Fees as Damages (Responsive to Brief in Opposition, p. 22)

Petitioners obviously oppose this request. A similar motion was rejected by the Court of Appeals in this case. The Court of Appeals did not rule on a Motion to Strike which Respondents aimed at a routine letter, per Fed. R. App. P. 28.8, listing on recent opinions involving *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) prior to oral argument. Respondent continues to wield the bludgeon forged below.

CONCLUSION

The test under ERISA Sec. 510 in the Fifth Circuit – proving "specific intent" when an employee has already been specifically fired – will be impossible to meet by

circumstantial evidence, thwarting the purpose of Congress.

Other persons protected by ERISA Sec. 510 will rarely if ever find counsel to plead their cases: the amorphous contours of the so-called *prima facie* test have now become the unsteady fulcrum on which multiple sanctions turn. These factors alone would justify the grant of certiorari. *Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998) (COBRA entitlement).

Even more compelling is the question of judicial retaliation for properly invoking recusal and to deter appeals. There is no way to know how widely such maneuvers are employed, for their very objective is to insulate the courts from appellate or official review.

The Petition under consideration may be the Supreme Court's best and, for a very long time, its last chance to draw the boundary between authorized sanctions and "judicial bludgeoning". *Natural Gas Pipeline Company of America v. Energy Gathering, Inc., supra.*

The Petition should therefore be granted.

Respectfully submitted,

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APPENDIX Q

PLAINTIFF'S EXHIBIT C

The Moody Foundation

1996 And 1997 Annual Report

* * *

Statements of Financial Position

December 31, 1997 and 1996	1997	1996
ASSETS		
Cash and cash equivalents	$ 4,110,000	6,127,000
Investments, at cost (note 3): Stocks with published quotations: American National Insurance Company common (notes 1 and 5)	55,729,000	55,729,000
Other	11,256,000	9,150,000
Bonds and other debt instruments	207,057,000	201,135,000
U.S. Treasury obligations	89,059,000	75,673,000
Common stocks without published quotations	1,072,000	1,072,000
Notes receivable	814,000	795,000
Real estate, at cost	2,034,000	2,034,000
TOTAL INVESTMENTS	367,021,000	345,588,000

Assets held for charitable purposes, net of accumulated depreciation of $1,774,000 and $1,385,000 in 1997 and 1996 (note 4)	2,226,000	2,615,000
Other assets, net of accumulated depreciation of $1,382,000 and $1,331,000 in 1997 and 1996	1,092,000	1,368,000
TOTAL ASSETS	$374,449,000	355,698,000
LIABILITIES AND NET ASSETS		
Liabilities:		
Grants payable	130,316,000	154,221,000
Other liabilities	226,000	–
NET ASSETS (note 5):		
Principal:		
Permanently restricted	59,492,000	51,369,000
Unrestricted	215,956,000	214,307,000
Unrestricted loss	(31,541,000)	(64,199,000)
TOTAL NET ASSETS	243,907,000	201,477,000
Commitments and contingencies (note 8)		
TOTAL LIABILITIES AND NET ASSETS	$374,449,000	355,698,000

See accompanying notes to financial statements.

* * *

difference between the fair market value on the date of the donation and the book basis of the donated assets.

Grants

The Foundation recognizes grant appropriations, which are unconditional promises to give, as expenses at the time grants are committed to the recipient organizations. The Foundation recognizes grant appropriations, which are conditional promises to give, as expenses when the conditions on which they depend have been substantially met. Scholarship program grants are paid over a four-year period. The Foundation's Scholarship Committee, comprised of prominent educators, awards scholarships to selected students on an annual basis.

Long-Lived Assets

Effective January 1, 1996, the Foundation adopted Statement of Financial Accounting Standards No. 121, *Accounting for the Impairment of Long-Lived Assets and for Long-Lived Assets to be Disposed Of* (SFAS No. 121). SFAS No. 121 provides guidance for recognition and measurement of impairment of long-lived assets, certain identifiable intangibles and goodwill related both to assets to be held and used and assets held for disposition. The effect of adopting this accounting standard was not material.

Income Taxes

The Foundation is a nonprofit trust and is exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code.

Federal Excise Taxes

The Moody Foundation is classified as a "Private Foundation" as defined in the Tax Reform Act of 1969 (the Act). In general, private foundations are subject to excise tax of two percent on net investment revenue (as defined in the Act). The Foundation's two percent excise tax on net investment income is recognized as an expense as they accrue.

(2) INTEREST IN LIBBIE SHEARN MOODY TRUST

The Foundation received from the Estate of W.L. Moody, Jr. certain life estates in the Libbie Shearn Moody Trust (the Trust). Distributions from the Trust related to purchased life estate interests were approximately $1,649,000 and $1,378,000 in 1997 and 1996, respectively. These distributions are recorded as unrestricted net assets when received.

As each life estate expires, the Foundation receives distributions from the Trust applicable to its 75 percent remainderman interest in the income attributable to the expired life estate. Remainderman distributions totaled approximately $15,638,000 and $12,783,000 at December 31, 1997 and 1996, respectively. One-half of these distributions is restricted corpus and the remaining funds are recorded in unrestricted net assets. On expiration of all life estates, the Foundation will receive 75 percent of the assets of the Trust.

* * *

The cost and estimated market value of debt securities at December 31, 1997, by contractual maturity, are shown below. Expected maturities may differ from contractual

maturities because borrowers may have the right to call or prepay obligations with or without call or prepayment penalties.

	Cost	Estimated Market Value
Due in one year or less	$ 98,473,000	99,421,000
Due after one year through five years	39,365,000	38,729,000
Due after five years through ten years	148,068,000	149,303,000
Due after ten years	9,616,000	9,666,000
	295,522,000	297,119,000
Mortgage-backed securities	594,000	638,000
	$296,116,000	297,757,000

(4) ASSETS HELD FOR CHARITABLE PURPOSES

Assets held for charitable purposes were unrestricted at December 31, 1997 and 1996 and are as follows:

	December 31,	
	1997	**1996**
IMAX projector equipment, net of depreciation	$ 1,558,000	1,947,000
Rare medical books collection	615,000	615,000
Oil painting	43,000	43,000
Other	10,000	10,000
	$ 2,226,000	2,615,000

(5) NET ASSETS

Permanently restricted net assets are determined by the original Trust Indenture and consist primarily of 338,522 shares of ANICO common stock and other amounts not specifically identified. The amounts not specifically identifiable are adjusted each year by the amount of capital appreciation or depreciation. Permanently restricted net assets (restricted to investment in perpetuity, the income from which is expendable to support grants) at December 31 1997, and 1996, are as follows:

	1997	1996
ANICO stock (338,522 shares) at cost	$ 3,006,000	3,006,000
Paintings	9,000	9,000
Unidentified net assets	56,477,000	48,354,000
	$59,492,000	$51,369,000

(6) QUALIFYING DISTRIBUTIONS

Annually, the Foundation is required to distribute assets sufficient to meet the minimum qualifying distributions as determined under federal tax regulations. During 1997, the Foundation used $4,100,000 of excess distributions, arising in prior years, to meet this minimum requirement.

As of December 31, 1997, the Foundation's distributable amount exceeds qualifications by approximately $227,000. The Foundation will be subject to a 15% penalty tax should it not make minimum qualifying distributions of $227,000 by 1998. The Foundation has no intention of becoming subject to this penalty tax.

(7) RELATED PARTY TRANSACTIONS

The Moody National Bank of Galveston leases office space to the Foundation and provides the Foundation with general banking services. In addition, the Foundation uses the Bank's trust department for general bookkeeping services and physical custody of records and marketable securities. Total expenses paid to the Bank were approximately $333,000 and $311,000 in 1997 and 1996, respectively. The Moody National Bank of Galveston also serves as trustee for the Libbie Shearn Moody Trust (see note 2).

Insurance premiums paid to NICO under a hospitalization insurance plan were approximately $126,000 and $118,000 for the years ended December 31, 1997 and 1996, respectively.

Administration of the Foundation's defined benefit pension plan is performed by ANICO. Fees paid to ANICO for administration of the plan totaled approximately $2,000 during each of the years ended December 31, 1997 and 1996.

Members of the Board of Trustees and certain employees of the Foundation hold various positions with organizations which provide services to or receive grants from the Foundation. In addition, the Foundation's investment portfolio includes investments in other entities in which the Libbie Shearn Moody Trust and other related parties have common investments. The Foundation has a number of recurring transactions with such entities. However, such transactions are conducted on an arms-length basis.

(8) PENSION PLAN

The Foundation has a defined benefit pension plan covering substantially all full-time employees with one or more years of service. The benefits are based on years of service and average compensation. The Foundation's general funding policy is to contribute annually at least the minimum required contribution. Contributions are intended to provide nor only for benefits attributed to service to date but also for those expected to be earned in the future.

APPENDIX R

PLAINTIFF'S EXHIBIT D

ACTIVITIES

AMERICAN NATIONAL INSURANCE COMPANY

1998 Annual Report

Nine-Year Financial Highlights

FOR THE YEARS ENDED DECEMBER 31,

(In millions, except per share data and ratios)

	1998	1997	1996	1995	1994	1993	1992	1991	1990
Operating Results									
Revenues	$ 1,745	$ 1,740	$ 1,550	$ 1,471	$ 1,395	$ 1,329	$ 1,318	$ 1,197	$ 1,100
Operating earnings (a)	155	182	178	157	156	149	137	114	95
Realized capital gains (b)	42	66	37	49	59	36	32	12	14
Net income	197	248	216	206	215	185	169	126	109
Operating earnings per share (a)	5.86	6.88	6.74	5.95	5.88	5.65	5.17	4.32	3.47
Realized capital gains per share (b)	1.59	2.50	1.40	1.84	2.24	1.35	1.20	0.44	0.49
Net income per share	7.45	9.38	8.14	7.79	8.12	7.00	6.37	4.76	3.96
Financial									
Assets	$ 8,816	$ 8,483	$ 7,989	$ 7,140	$ 5,961	$ 5,451	$ 5,165	$ 5,077	$ 4,754
Investments	7,143	6,982	6,566	5,821	4,811	4,368	4,165	4,129	3,836
Liabilities	5,901	5,778	5,515	4,819	3,889	3,489	3,308	3,299	3,147
Insurance and annuity liabilities	5,283	5,261	5,046	4,364	3,520	3,069	2,911	2,876	2,794
Total equity (c)	2,915	2,705	2,474	2,321	2,072	1,962	1,857	1,778	1,607
Total equity, excluding SFAS 115	2,884	2,681	2,458	2,291	2,075	—	—	—	—
Insurance Production Information									
Life insurance sales	$ 11,417	$ 10,091	$ 10,134	$ 10,135	$ 9,520	$ 9,145	$ 8,699	$ 6,757	$ 6,767
Life insurance in force (d)	44,848	43,805	42,529	41,490	40,070	38,564	37,488	31,318	30,989
Policy account deposits	290	392	757	867	455	138	118	114	104
Common Stock Statistics									
Market close	$ 82.75	$ 93.00	$ 73.75	$ 66.50	$ 47.00	$ 51.25	$ 52.00	$ 41.25	$ 27.50
Book value per share	110.07	102.17	93.43	87.66	78.26	74.09	70.12	67.13	60.63
Dividends per share	2.70	2.62	2.54	2.40	2.24	2.08	1.92	1.76	1.63
Shares outstanding (000's) (e)	26,479	26,479	26,479	26,479	26,479	26,479	26,479	26,479	26,504
Financial Ratios									
Return on equity (f)	10.4%	12.2%	9.5%	15.1%	8.7%	8.6%	7.3%	13.5%	2.2%
Operating return on equity (g)	5.8%	7.4%	7.8%	7.6%	7.9%	8.1%	7.7%	7.1%	6.0%
Dividend payout (h)	46.1%	38.1%	37.7%	40.3%	38.1%	36.8%	37.2%	40.8%	46.9%
Assets per $100 of liabilities	$ 149	$ 147	$ 145	$ 148	$ 153	$ 156	$ 156	$ 154	$ 151

(a) After tax and excluding gains from sale of investments.
(b) After tax gains from sale of investments.
(c) Reflects adoption of SFAS 115, "Accounting for Certain Investments in Debt and Equity Securities." at January 1, 1994.
(d) Includes insurance acquired of $6,596,000,000 in 1992.
(e) Number of shares outstanding at year-end.
(f) Change in total equity before dividends to stockholders divided by total equity at the beginning of the year.
(g) Operating earnings per share divided by book value per share at the beginning of the year, adjusted to exclude the effect of SFAS 115.
(h) Total dividends paid to stockholders divided by operating earnings.

Directors

Robert L. Moody
Chairman of the Board and President
Chief Executive Officer
American National Insurance Company
Galveston, Texas

Chairman of the Board
National Western Life Insurance Company
Austin, Texas

President
Moody Bancshares, Inc.
Galveston, Texas

G. Richard Ferdinandtsen
Senior Executive Vice President
Chief Operating Officer
American National Insurance Company
Galveston, Texas

Russell S. Moody
Investments
Austin, Texas

Irwin M. Herz, Jr.
Attorney
Greer, Herz & Adams LLP
Galveston, Texas

W. L. Moody IV
Investments and Ranching
Oil and Gas
Galveston, Texas

Frances Anne Moody
Executive Director
The Moody Foundation
Dallas, Texas

E. Douglas McLeod
Attorney
Director of Development
The Moody Foundation
Galveston, Texas

Joe Max Taylor
Sheriff
Galveston, Texas

R. Eugene Lucas
President
Gal-Tex Hotel Corporation
Galveston, Texas

APPENDIX S

PLAINTIFF'S EXHIBIT F

SECURITY OWNERSHIP OF CERTAIN BENEFICIAL OWNERS

The information contained in the following table is given with respect to each person or group of persons known to management to be the beneficial owner of more than five percent (5%) of the Company's Common Stock on December 31, 1998:

Title of Class	Name and Address of Beneficial Owner	Amount and Nature of Beneficial Ownership	Percent of Class
Common Stock	THE MOODY FOUNDATION[1] 704 Moody National Bank Bldg. Galveston, Texas 77550	6,274,500 (Direct)	23.70
Common Stock	LIBBIE SHEARN MOODY TRUST[2] C/O The Moody National Bank of Galveston Trust Department 2302 Postoffice Street Galveston, Texas 77550	9,949,585 (Direct)	37.58

Common Stock	THE MOODY NATIONAL BANK OF GALVESTON TRUSTEE[2][3][4] 2302 Postoffice Street Galveston, Texas 77550	9,949,585 (Indirect)	37.58
		1,653,076 (Indirect)	6.24

(1) The Moody Foundation is a private foundation established for charitable and educational purposes. The Trustees of The Moody Foundation are Mrs. Frances Moody Newman, Robert L. Moody, who is also a director (and nominee for director at the Annual Meeting) of the Company, and Ross Rankin Moody.

(2) The Moody National Bank of Galveston ("Moody Bank") is the Trustee of the Libbie Shearn Moody Trust and as such, has sole voting power with respect to the 9,949,585 shares of Common Stock owned by such Trust.

(3) In addition to acting as Trustee of and voting the Common Stock owned by the Libbie Shearn Moody Trust. Moody Bank also acts as trustee for and votes the 1,155,000 shares of Common Stock owned by the W.L. Moody, Jr. Trust for Grandchildren ("Trust 19") and the 498,076 shares of Common Stock owned by other trusts. See "Security Ownership of Management" for additional information.

(4) Management has been advised that Moody Bank Holding Company, Inc. ("MBHC"), which is wholly-owned by Moody Bancshares, Inc. ("Bancshares"), owns approximately 97.8% of the common stock of Moody Bank. Management has further been advised that the Three R Trusts, a trust created by Robert L. Moody for the benefit of his children (two of whom,

Frances Anne Moody and Russell S. Moody, are directors of the Company and nominees for director at the Annual Meeting), own 100% of Bancshares' Class B Stock (which elects a majority of Bancshares directors) and 49.6% of Bancshares' Class A Stock. The Trustee of the Three R Trusts is Irwin M. Herz, Jr., a partner in Greer, Herz & Adams, L.L.P., 18th Floor, One Moody Plaza, Galveston, Texas, General Counsel to the Company, Bancshares and MBHC, and a director of the Company (and nominee for director at the Annual Meeting), Robert L. Moody is Chairman of the Board, Chief Executive Officer and a director of Moody Bank and President and a director of Bancshares and MBHC. W.L. Moody IV, a director of the Company (and nominee for director at the Annual Meeting), is an advisory director of Moody Bank.

APPENDIX T

PLAINTIFF'S EXHIBIT G

[LOGO]
THE MOODY FOUNDATION
2302 Postoffice Street, Suite 704
GALVESTON, TEXAS 77550-1994

May 12, 1999

FRANCES ANNE MOODY
EXECUTIVE DDIRECTOR

Tina Scheve
c/o Mark S. Stevens
P. O. Box 8118
Galveston, Texas 77553-8118

Dear Ms. Scheve

This letter is a follow-up to our telephone conversation of May 3, 1999. In that conversation, you asked for the reason for your termination from employment for The Moody Foundation. I told you that your job performance and attitude were not up to the standards of The Moody Foundation. I do not recall your asking for any statement in writing. However, I have since learned that your attorney has made such a request. This letter is intended to be in response to that request.

I regret that your termination became necessary. However, I sincerely wish you the best of luck in the future.

Yours very truly,

/s/ Frances Moody
Frances Moody

FAM/pe

App. 17

Created for the perpetual benefit of Texans by
William Lewis Moody, Jr. and wife,
Libbie Shearn Moody